

NO. 49212-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

PHILMER JOHNNY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00054-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court did not abuse its discretion in refusing to give Johnny's proposed jury instruction.**
- II. The trial court's instructions to the jury fully allowed Johnny to argue his theory of the case.**
- III. The State does not intend to seek a cost bill.**

STATEMENT OF THE CASE

The State charged Philmer Johnny (hereafter "Johnny") with Hit and Run – Injury and Driving under the Influence, based on an incident that occurred on July 27, 2014. CP 1-2. At trial, the State presented several witnesses, including Savannah and Richard Mobley, the passengers in the vehicle Johnny hit, as well as the officer who responded to the scene, another witness who was struck by Johnny after he struck the Mobleys, and a toxicologist from the Washington State Patrol. RP 103-206

At trial, the testimony of the State's witnesses showed that on July 27, 2014 at 2:30 AM Savannah Mobley was stopped at a stoplight on SE Mill Plain Boulevard at the intersection with SE 126th Avenue, in Vancouver, Washington. RP 104. There were hardly any other cars on the road at this time. RP 104. Ms. Mobley was in her vehicle with her husband, Richard Mobley, when she saw headlights coming up fast from her rear view mirror. RP 104, 118. Those headlights were from Johnny's, vehicle. RP 104. Johnny slammed into the Mobley's car, sending it all the way through the intersection to the other side. RP 104-105, 106. The

Mobleys were stopped in their vehicle for around ten seconds when they saw Johnny suddenly turn left in the intersection and take off down a side street. RP 105. Johnny made no signal to have the Mobleys follow him, and he bolted away from the scene. RP 113, 115. The Mobleys followed Johnny in order to get his license plate number. RP 105.

The Mobleys drove after Johnny for at least a half a mile down the road from the collision when they caught up to him at a roundabout at the end of a road. RP 106, 111, 113, 127. When they caught up to Johnny he was outside looking at his vehicle, stumbling, and waving his fists at the Mobleys. RP 106. It appeared as though Johnny was coming to hurt the Mobleys, and the Mobleys were afraid of him. RP 127-28. Johnny got back into his vehicle and drove away, and at no point ever exchanged, nor attempted to exchange, information with the Mobleys. RP 106-107. Between the collision scene and the place Johnny stopped there were lots of restaurants, stores, and driveways to pull into. RP 116.

During the trial, defense counsel requested a jury instruction on the duty to supply information to the other party in an accident. RP 208. The instruction stated: “the duty to supply information to the other party in an accident may be excused if the other party leaves the scene of the accident.” CP 17. Defense counsel argued that inclusion was proper based on the decision of *State v. Teuber*, 19 Wn. App. 651, 577 P.2d 147, *review*

denied, 91 Wn.2d 1006 (1978), and because the evidence was clear that the Mobleys left the scene. RP 209-210.

The trial court denied the request to give the instruction. RP 210. The court stated that *Teuber* dealt with the sufficiency of the evidence, and not jury instructions. RP 210-11. The court differentiated between the facts of *Teuber* with the facts of Johnny's case, and found that the evidence did not allow the court to say that Johnny was excused from his duty. RP 211. In regards to Johnny's case, the court stated that:

(t)here's no evidence from which a jury could find, at least so far, that he was attempting to exchange information at the scene of the accident.

The scene of the accident was where he hit the person who – the car of the person who was ultimately injured. And the testimony of everyone involved with that accident is that Mr. – after waiting a few seconds to see if Mr. Johnny did – got out, he didn't get out. He then drove his car anywhere from half a mile to two miles away from the scene – but he drove away from the scene – and that he only interacted again with the people involved not because he was at the scene or returned to the scene of the accident but because they chased him down to the place where he was. That's not the scene of the accident. And so the circumstances are different. There's no basis for the instruction.

RP 211-12.

The trial court ruled that there was no basis for the instruction, but that defense counsel could still argue that what Johnny did was enough to fulfill the requirement that he stay at the scene. RP 212. The remaining

jury instructions included the standard WPIC instructions for a Hit and Run – Injury case. CP 18-38. Jury Instruction 4 was WPIC 4.01, which instructs the jury that a defendant is presumed innocent, and that the State has the burden to prove each element of each crime beyond a reasonable doubt. CP 24; RP 219-20. Jury instruction 9 was WPIC 97.02, and it included all the elements of Hit and Run – Injury. CP 29; RP 221-22.

During closing arguments counsel for Johnny argued that the State had the burden to prove all the elements of the offense, and that “defense has no burden whatsoever at all.” RP 238. Counsel for Johnny also argued that Johnny did not fail to perform his duties after the accident. RP 240. Counsel argued that if Johnny had wanted to leave the scene he would have been “long gone.” RP 241. He also argued that where Johnny ultimately stopped his vehicle was not very far away, and that it was not unusual to move your car to safety based on where the collision occurred. RP 241. Counsel further argued that the Mobleys did not give Johnny the chance to exchange information when they followed him to get his license plate number and then left. RP 241-42. The State argued that the hit and run was already completed by the time the Mobleys found Johnny a half mile away. RP 249.

The jury returned a verdict of guilty on one count of Hit and Run – Injury. RP 253; CP 37. Johnny was sentenced to a standard range sentence. CP 83-92. This appeal timely follows

ARGUMENT

I. The trial court did not abuse its discretion in refusing to give Johnny’s proposed jury instruction.

Johnny claims that the trial court erred when it refused to give his proposed jury instruction on when a driver’s duties are excused after a collision. Johnny claims that his right to present a defense was infringed when the trial court refused to give the proposed instruction. Johnny also claims that the holding in *Teuber* mandates the giving of the instruction in this case. 19 Wn. App. 651. However, the trial court did not err in refusing to give the instruction, because there was no evidence in the record to support the instruction. Furthermore, *Teuber* is inapplicable to the present case. His claim fails.

A trial court’s refusal to give a requested jury instruction based on factual reasons is reviewed for an abuse of discretion. *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007) (citing *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Finch*, 137 Wn.2d 792,

981, 975 P.2d 967 (1999) (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

There must be sufficient evidence to support a proposed jury instruction. *White*, 137 Wn. App. at 230 (citing *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003)). However, a party may only give an instruction supporting its theory of the case if there is substantial evidence in the record to support that theory. *State v. Yokel*, 196 Wn. App. 424, 433, 383 P.3d 619 (2016) (citing *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009)).

The trial court's refusal to give Johnny's proposed instruction was based on a lack of evidence in the record, and therefore the trial court's decision is reviewed for an abuse of discretion. RP 211; *Walker*, 136 Wn.2d at 777. There is no evidence in the record to support Johnny's proposed jury instruction. His proposed instruction is only applicable if the other party to a collision leaves the scene of the accident first. CP 17. However, the evidence at trial showed that Johnny was the party who left the scene, and that the Mobleys only left the scene in order to follow Johnny. Johnny's argument that the Mobleys left the scene misstates the evidence at trial. There was no evidence at trial that the Mobleys left the scene of the accident, thus there is no evidence to support the instruction. The trial court did not abuse its discretion in refusing to give Johnny's

proposed instruction. *See White*, 137 Wn. App. at 230 (citing *Redmond*, 150 Wn.2d at 493).

All the evidence at trial showed that Johnny fled the scene of the collision. Mr. and Ms. Mobley both testified that the collision occurred at the intersection of 126th Ave and Mill Plain Blvd. RP 104-5, 118. Ms. Mobley testified that they waited at the intersection for around ten seconds when Johnny suddenly turned left onto a side street. RP 105. Ms. Mobley described Johnny as having “bolted” to the left and taken off from the scene. RP 113. Mr. Mobley testified that Johnny sped off and stopped at the end of the road. RP 126. Between the scene of the collision and where Johnny drove to there were lots of restaurants, stores, and driveways to pull off into. RP 116. However, the testimony from Ms. Mobley was that Johnny had driven around half a mile when he stopped at a turnaround/roundabout. RP 105, 111. The Mobleys both testified that they left the scene of the collision in order to follow Johnny and get his license plate number. RP 105, 119.

This evidence shows that it was Johnny who fled the scene of the collision, not the Mobleys. The scene of the collision was the intersection where Johnny hit the Mobleys, and the testimony established that he left the scene first and the Mobleys only left to follow him. Not only is there a lack of substantial evidence in the record to support Johnny’s proposed

instruction; there is no evidence whatsoever that the Mobley's left the scene except to chase down Johnny. It cannot be said that Johnny's duty to supply information at the scene was excused when the Mobley's left, because it was his earlier flight from the scene that caused the Mobley's to leave after him. As such, the record does not support Johnny's proposed jury instruction for an excuse of duty. *See Yokel*, 196 Wn. App. at 433 (citing *Powell*, 150 Wn. App. at 154).

The trial court did not abuse its discretion when it denied Johnny's proposed excuse of duty instruction. The trial court explicitly stated that it was denying the instruction because of a lack of evidence in the record. RP 211-12. The record at trial supports this ruling. Johnny's theory of the case was that the Mobleys left first, so he did not fail in his duty to exchange information. RP 240. However, there was no evidence at trial to permit the trial court to give the proposed instruction. The trial court's ruling was reasonable, and therefore was not an abuse of discretion.

However, even if this Court finds it was error to fail to give Johnny's proposed instruction, such error was harmless beyond a reasonable doubt. This type of error may be considered harmless if this Court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result despite the error. *State v. Williams*, 81 Wn. App. 738, 744, 916 P.2d 445 (1996) (citing *State v. Aumick*, 126

657-58. The evidence at trial was that Evans and Wahl were sitting in Evans' parked car in front of a duplex where Teuber lived on one side and Wahl lived on the other side. *Id.* at 652. Teuber was parking his car when he backed into Evans' car doing little to no damage. *Id.* Evans backed his car away from Teuber's and then had a conversation with Teuber about the impact. *Id.* at 652-53. Evans then returned to his vehicle and was going to go inside to call the police when Teuber drove in reverse and slammed into Evans' car from 10 feet away. *Id.* at 653. This impact caused considerable damage. *Id.* Evans and Wahl then entered the home, called police, and an officer arrived 5 minutes later. *Id.* When the officer arrived Teuber had left the scene, but left his car parked outside. *Id.* Teuber testified at trial that he told Evans he had insurance, tried to talk to Evans about the accident, but that Evans wouldn't listen and walked into Wahl's home. *Id.*

The Court of Appeals held that Evans and Wahl had left the scene and thus had relieved Teuber of the requirement to provide his driver's license. *Id.* at 657. The Court relied on the evidence that Evans and Wahl already had Teuber's name, because he was Wahl's neighbor, and that Teuber's car was never moved, so the license plate was visible. *Id.* The Court held that Teuber's duty was relieved because Evans and Wahl were

in a condition to receive the information from Teuber but they voluntarily departed. *Id.* at 657.

Teuber is inapplicable to the current case, because it's holding was based on a sufficiency of evidence claim raised by Teuber, not a challenge to a jury instruction. *Id.* at 652, 656. Its application in the context of jury instructions is not binding on this Court, and as such can only serve as guide to the issue on this appeal: whether or not the trial court abused its discretion in denying Johnny's instruction. The trial court was correct, because the facts of *Teuber* and the facts of Johnny's case are markedly different.

The key distinction between the cases is that Evans and Wahl left the scene first in *Teuber*, whereas here, Johnny left the scene first. *Id.* at 653; RP 105, 113, 126. According to the Court, Wahl and Evans leaving of the scene was what relieved Teuber from his duty under the hit and run statute. *Id.* at 657. Here, Johnny sped away, or bolted, from the scene of the accident, leaving the Mobleys to chase him down to the end of a street, a half mile down the road. RP 105, 111, 113, 126. Again, Johnny left the scene first. This shows that the Mobleys did not voluntarily leave the scene first like the victims in *Teuber*. Therefore, *Teuber* does not apply to the current case.

The facts are sufficiently different between the cases, and as such it was reasonable for the trial court to conclude that *Teuber* did not mandate the giving of Johnny's proposed instruction. This was not an abuse of discretion, and Johnny's conviction should be affirmed.

II. The trial court's instructions to the jury fully allowed Johnny to argue his theory of the case.

Johnny claims that he was entitled to have the jury instructed on his theory of the case. He claims that the trial court denied him with the opportunity to present his theory when it denied his jury instruction. However, the trial court did not abuse its discretion in denying his jury instruction. Furthermore, the instructions given by the court allowed Johnny to argue his theory of the case. His claim fails.

"Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party to argue their theory of the case." *Redmond*, 150 Wn.2d at 493 (citing *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980)). To determine the sufficiency of instructions, the test is whether the jury instructions as a whole allow a party to satisfactorily argue their theory of the case to the jury. *State v. Kindred*, 16 Wn. App. 138, 141, 553 P.2d 121 (1976) (internal citations omitted).

Johnny's case is similar to *State v. Picard*, 90 Wn. App. 890, 894, 954 P.2d 336 (1998), where the Court of Appeals upheld the trial court's refusal to give a requested jury instruction. In *Picard*, the defendant appealed his conviction for first degree arson, and alleged, in part, that the trial court erred when it refused to give his proposed instruction on the presumptive causes of a fire. *Id.* at 902. Picard presented evidence through an expert at trial that the evidence was consistent with an accidental fire. *Id.* at 895. The State presented evidence to the contrary that included: an admission by Picard that he set the house on fire; testimony that Picard and his mother removed valuables from the house eight days before the fire; evidence of a credit card payment from Picard's mother's credit card for gasoline just before the start of the fire; insurance payments well above what the house had been listed for sale at a year prior; and forensic evidence that a portable heater had been tampered with and combustible material had been placed on its heating element. *Id.* at 894-95.

Picard's proposed instruction would have instructed the jury that "there is a presumption in law that the fire in this case was caused by accident or natural causes, rather than by a deliberate act of the defendant" *Id.* at 902. The trial court refused to give the instruction, and the Court of Appeals agreed and held that there was no abuse of discretion in not giving the instruction. *Id.* at 903. The Court upheld the trial court because

“the remaining instructions given, which instructed the jury on (1) the elements of arson, (2) that Picard is presumed innocent, and (3) that the State had the burden of proving these elements beyond a reasonable doubt, allowed Picard to argue the theory of his case.” 90 Wn. App. at 903.

The holding from *Picard* supports the trial court’s decision in Johnny’s case, because the remaining instructions allowed Johnny to argue his theory to the jury. The trial court gave jury instruction 4, which explicitly stated that the State had the burden to prove each element, and that Johnny was presumed innocent. CP 24; RP 219-20. This instruction matches instructions (2) and (3) from *Picard*. 90 Wn. App. at 903. Jury instruction 9 included all of the elements of Hit and Run – Injury that the State was required to prove, one of which was that Johnny must have failed to satisfy his obligation to fulfil the duty of stopping at the scene or as close thereto as possible. CP 29-30; RP 221-22. This instruction also matches the elemental instruction (1) from *Picard*. 90 Wn. App. at 903. Just as in *Picard*, these instructions allowed Johnny to argue his theory of the case.

Johnny’s theory was that his duty to give information was excused when the Mobleys drove away, and that is exactly what he argued to the jury. He argued that he was not able to perform his required duties, because the Mobleys drove away from him after getting his license plate

number. RP 241-42. He also argued that he did not the leave the scene when he drove down the road. RP 241. This shows that the given jury instructions allowed him to argue his theory to the jury, and that the trial court did not abuse its discretion in denying his proposed instruction.

Just as in *Picard*, the trial court here did not abuse its discretion in refusing to give Johnny's proposed excuse of duty instruction. Johnny's conviction should be affirmed.

III. The State does not intend to seek a cost bill.

The State does not intend to seek a cost bill in this case in the event it substantially prevails on appeal. Johnny's argument is therefore moot.

CONCLUSION

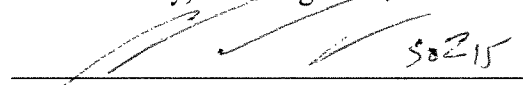
No evidence supported Johnny's proposed jury instruction, and the given instructions allowed him to argue his theory of the case. Johnny has not shown any error which requires reversal. This Court should affirm Johnny's conviction for Hit and Run – Injury.

DATED this 28 day of April, 2017.

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